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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1946.

AMERICAN STEVEDORES, INC., PETITIONER

v.

ROSARIO PORELLO AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated October 18, 1943, which overruled the Government's exceptions (R. 7–8), is reported at 53 F. Supp. 569. An opinion of that court on the merits dated December 6, 1944 (R. 68–71), is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 85–91) is reported at 153 F. 2d 605. Its *per curiam* opinion denying a petition for rehearing (R. 101–102) is reported at 153 F. 2d 609.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on January 10, 1946 (R. 91). A petition for rehearing (R. 92–100), filed by petitioner on January 23, 1946, was denied by the court below on January 31, 1946 (R. 103). The petition for a writ of certiorari was filed on March 25, 1946, and was granted on May 6, 1946 (R. 113). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a libel in admiralty to recover for personal injuries may be maintained against the United States under the Public Vessels Act.

2. Whether an action may be maintained by a longshoreman against a third-party tortfeasor to recover for personal injuries after he has accepted compensation for the same injury under the Longshoremen's and Harbor Workers' Compensation Act, voluntarily paid without an award by a deputy commissioner.

3. Whether, assuming an affirmative answer to both the foregoing questions, the United States was entitled in the instant case to be fully indemnified by petitioner.

4. Whether a court sitting in admiralty has authority to enforce the provisions of a stevedoring contract as establishing a right of indemnity,

or whether this constitutes a nonmaritime matter of which an admiralty court has no jurisdiction.

STATUTES INVOLVED

Pertinent provisions of the Public Vessels Act, c. 428, 43 Stat. 1112–1113 (46 U. S. C. 781–790); of the Federal Tort Claims Act, Title IV, Act of August 2, 1946, Public Law 601 (79th Cong., 2d Sess); and of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424, as amended (33 U. S. C. 901–950), are set forth in the Appendix, *infra*, pp. 51–54.

STATEMENT

On March 29, 1943, respondent Porello filed in the United States District Court for the Southern District of New York a libel (R. 2–5), and on November 18, 1943, an amended libel (R. 9–11) under the Public Vessels Act, 1925, to recover for injuries which he suffered on September 23, 1942, allegedly as the result of the negligence of the United States. While the libels did not so allege, at the time such injuries were sustained Porello was employed by the petitioner, which was engaged under a general stevedoring contract with the United States in loading the Navy transport U. S. S. *Thomas Stone*. While working in the No. 1 hold of the *Thomas Stone*, Porello, was struck by a falling thwartship beam and hatch covers in circumstances hereinafter described.

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On June 23, 1943, the United States filed exceptions and exceptive allegations to the libel (R. 5–6), seeking its dismissal on the ground that the Public Vessels Act does not permit the maintenance of a libel to recover for personal injuries. The exceptions and exceptive allegations were overruled on October 25, 1943 (R. 8), and on November 25, 1943, the United States answered (R. 11–13), preserving its objection to the jurisdiction of the court and denying negligence. On May 8, 1944, the United States impleaded American Stevedores, Inc., the petitioner in this Court, under Admiralty Rule 56, by a petition alleging that the negligence, if any, was that of the stevedore and setting forth certain provisions of the stevedoring contract between the Government and the petitioner (R. 13–15). The stevedore's answer (R. 15–18) denied fault and as an affirmative defense alleged that Porello, by electing to accept compensation payments under the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, as amended (33 U. S. C. 901 *et seq.*), had lost his right to maintain an action against a third-party tortfeasor prior to the filing of the libel.

Petitioner's stevedoring contract with the United States contained, among others, the following provisions in Articles 4, 12 and 13 (R. 65–66):

> [4] * * * The Stevedore shall, at its own cost and expense, rig and unrig all gear, rigging and equipment necessary for

loading heavy lifts when handled by ship's gear. The stevedore shall take off and put on all hatches, beams and tarpaulins; load, shift and lay all dunnage other than flooring or shoring timbers for heavy lifts, except as provided in paragraph 9 hereof. The Stevedore shall also furnish and pay all winchmen.

* * * * *

12. The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants.

13. The Stevedore shall at its own cost and expense carry the following insurance protection:

(a) Liability arising under Workmen's Compensation laws of the state in which the stevedoring is performed for injury to or death of employees, and also liability arising under the provisions of the Act of Congress approved March 4, 1927, entitled "Longshoremen's and Harbor Workers' Compensation Act" (Public #802).

(b) Liability to the public in the amount of $50,000.00 indemnity as respects bodily injury to or death of one person and subject to that limit for each person and in a total amount of $150,000.00 as respects bodily in-

jury to or death of more than one person on account of any one accident.

The libel and amended libel alleged that the United States was at fault in causing Porello's injuries by failing to have one of the vessel's winches in proper order (R. 4, 10). At the trial the libel was again amended to allege solely that the United States had been negligent in failing to provide a locking device on the thwartship beam or strongback which, together with the hatch covers it supported, fell upon Porello (R. 19). The thwartship beam in question was one of three one-ton strongbacks laterally transversing the aperture in the 'tween deck immediately above the No. 1 hold of the vessel. Prior to commencing loading operations, two of these beams were removed but the forward beam was left in place. (R. 49.) DiMare, petitioner's foreman, inspected this beam, which rested in slots placed in the permanent structure of the platform deck immediately above the hold, and saw that it did not have any locking device on it such as would prevent it from becoming dislodged by pressure on its underneath side (R. 54–55). DiMare nevertheless left the beam in place and neither took any steps to lash it securely in its sockets nor reported the absence of a locking device to anyone (R. 55; cf. 22). The accident occurred on the following day when DiMare ordered a one and one-half ton motor vehicle, which had already been lowered into the hold and swung underneath the beam,

raised for the purpose of stowing it in a different section of the No. 1 hold (R. 50–51). Although the vehicle did not lift when he gave this order, DiMare made no investigation of the reason why the vehicle remained stationary, but instead repeated the order (R. 51). The vehicle was thereupon lifted approximately a foot above the floor of the hold (R. 51–52, 54). A wooden spreader passing above the vehicle and attached to the wires of the sling in which it rested was caught on the thwartship beam. As a result of raising the vehicle, the beam was lifted from its slot and it and a number of hatch covers fell into the hold. (R. 26, 51, 54.) The beam struck Porello, inflicting severe injuries, resulting in permanent partial disability (R. 52).

Within two weeks after the accident, workman's compensation payments to Porello were voluntarily commenced by petitioner's insurance carrier. Beginning October 5, 1942, the carrier issued checks to Porello at two-week intervals until July 12, 1943, some 14 weeks after the filing of the libel (R. 76–77). None of such payments was made under an award by a deputy commissioner of the United States Employees Compensation Commission. All of these checks were endorsed and cashed by Porello. (R. 80, 82.) On March 26, 1943, Porello gave notice to the insurance carrier and petitioner of his intention to sue the United States as a third-party tortfeasor (R. 80), and on March 29, 1943, brought this suit.

The district court entered findings of fact, conclusions of law, and an opinion on December 6, 1944, holding (1) that Porello, not having accepted compensation under an award by a deputy commissioner, was not barred from maintaining the action; (2) that the United States had been negligent in failing to provide Porello with a safe place in which to work; and (3) that petitioner stevedore had been negligent in the performance of its loading operations (R. 68–71). The district court's final decree, dated December 19, 1944, awarded judgment in the amount of $11,581.77 against the United States and decreed that it should receive contribution from petitioner to the extent of one-half of the judgment, the amount of both the damages awarded Porello and the contribution awarded the United States to be reduced by an amount equal to the compensation payments which had been accepted by Porello (R. 71–72).

On cross-appeals by the United States (R. 73–74) and the stevedore (R. 83), the court below affirmed the rulings of the district court sustaining Porello's right to maintain the libel, and increase the amount of his recovery to $21,781.77 (R. 85–91). It further held that "the absence of the lock [on the beam] and DiMare's negligent order operated concurrently in producing the result" (R. 88). The court below, however, modified the decree of the district court by providing that the United States should be fully indemnified by peti-

tioner for the judgment obtained against it (R. 89). The court below, by a *per curiam* opinion, denied the stevedore's petition for rehearing (R. 101–102).[1]

SUMMARY OF ARGUMENT

1. There exists some evidence of a subsequent Congressional understanding that the Public Vessels Act embraces personal injury actions, which may properly be evaluated in determining its scope. Such evidence is contained in the recently enacted Federal Tort Claims Act which excepts from its scope "any claim for which a remedy is provided by" the Public Vessels Act. Apart from this, the use of the unqualified word "damages" in the Public Vessels Act would seem on its face to include damage to persons as much as damage to property. In view of the legislative history of the Public Vessels Act there may, however, be reason to doubt whether the statute was intended to sanction personal injury actions.

2. Petitioner's contention that the acceptance, not under an award, of compensation under the Longshoremen's and Harbor Workers' Compen-

[1] In its original opinion the court expressed the view that contribution could not be awarded in the instant case by reason of petitioner's immunity from direct suit under the provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 905). In its opinion denying rehearing, the court receded from this position, stating that "the point may be considered left open since determination of the right of contribution is not essential to decision as to indemnity under the respondent's contract" (R. 101).

sation Act by the respondent Porello, prior to the filing of his libel herein, constituted a binding "election" preventing the subsequent maintenance of this action is without merit. Neither the language of that Act nor the legislative history relied upon by petitioner warrants such a conclusion.

3. The decision of the court below conferring a right upon the United States to receive indemnity from petitioner for the judgment awarded Porello against the Government is correct. There is here involved a contract clause which specifically provides that the petitioner "shall be responsible for any and all damage or injury to persons, and cargo" occurring in the course of petitioner's stevedoring work "through the negligence or fault of the stevedore, his employees and servants." The findings of both of the courts below, fully supported by the evidence, that petitioner was negligent conclusively establishes the applicability of this provision, irrespective of the findings below that the negligence on the part of the Government operated concurrently with that of petitioner in causing Porello's injuries. Petitioner's contention that this clause only allows the Government to indemnify itself when there has been no fault on the Government's part would render the clause meaningless, since the Government would not then be liable in any event. Furthermore, apart from the specific contractual provision for indemnity, the Government

would have a right to indemnification from the petitioner under recognized principles of admiralty and common law. The general relationship established by the contract made the petitioner-stevedore responsible for the loading of the vessel and made it liable to the owner of the vessel for its negligence occurring during the loading operation even though the owner might be liable to a third party. And entirely apart from the contractual relationship, it seems clear that the petitioner was primarily responsible for the accident because its negligence partook of the character of recklessness, and because the relative fault of the United States was so slight as to warrent the application of the principle of admiralty that in such circumstances the party whose fault was major shall pay the entire damages.

ARGUMENT

I

THE LEGISLATIVE HISTORY OF THE PUBLIC VESSELS ACT DEMONSTRATES NO EXPRESS CONGRESSIONAL INTENTION TO WAIVE IMMUNITY FROM LIABILITY FOR PERSONAL INJURY CAUSED BY A PUBLIC VESSEL

The enactment of the Federal Tort Claims Act[*] subsequent to our acquiescence in certiorari herein has substantially diminished the broad significance of the question whether the Public Vessels Act, 1925, grants jurisdiction of actions to recover

[*] Act of August 2, 1946, Title IV, Pub. L. 601, 79th Cong., 2d Sess., Appendix, *infra*, pp. 52–53.

for personal injury. That Act permits the bringing against the United States of a libel *in personam* in admiralty "for damages caused by a public vessel of the United States" (Appendix, infra, p. 51). A holding that the Public Vessels Act does not authorize suit for personal injury will, in respect to causes of action arising after January 1, 1945, simply remit a claimant to the remedy provided by the Tort Claims Act.[3] But it must be emphasized that Congress chose not to make the provisions of the Tort Claims Act generally applicable to maritime actions sounding in tort. On the contrary, by express provision of that Act,[4] suits for property damage caused by all government-operated vessels, and suits for personal injuries, at least when caused by merchant vessels operated by the Government, remain cognizable under the Suits in Admiralty and Public Vessels Acts. While waivers of sovereign immunity are strictly construed, now that tort liability is general it would be incongruous for a

[3] In respect of claims arising on or after January 1, 1945, the Act provides generally that suit may be maintained "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred."

[4] Section 424 (a).

single type of maritime tort—personal injury caused by a public vessel—to be actionable only under the Tort Claims Act whereas all other maritime torts for which the United States is responsible remain actionable under the specialized maritime legislation. It is unlikely that Congress deliberately intended so anomalous a result. On the contrary, it would seem that a broad interpretation of the waiver effected by the Public Vessels Act is justified.[5] Cf. *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 228.

Nonetheless, a solution of this problem is not only indispensable to the disposition of this case, since Porello's injury occurred in 1942, prior to the effective date of the Tort Claims Act, but is essential to furnish definitive guidance to future litigants as to the proper Act under which to assert their claims,[6] since the Tort Claims Act does not apply to any claim for which a remedy

[5] Subsequent legislation is a proper aid in the construction of prior enactments. *Tiger* v. *Western Investment Company*, 221 U. S. 286, 289; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 276; cf. *United States* v. *Hutcheson*, 312 U. S. 219.

[6] *E. g.*, the Tort Act contains a one-year limitation period, whereas suit may be brought under the Public Vessels Act within two years. Again, a foreign national may maintain a suit for personal injury under the Tort Claims Act (assuming no difficulty as to venue) (see Sec. 410 (a); cf. *McGhee* v. *United States*, 154 F. 2d 101 (C. C. A. 2)) without the showing required under the Public Vessels Act (Section 5, 46 U. S. C. 785) that his country furnishes reciprocal rights to citizens of the United States.

is provided by the Suits in Admiralty or the Public Vessels Acts. Accordingly, we outline the considerations which originally led us to acquiesce in certiorari to review this question.

The use of the unqualified word "damages" would seem on its face to include damage to persons as much as damage to property.[7] In view of the legislative history of the Public Vessels Act there may, however, be reason to doubt whether the statute was intended to sanction personal injury actions.

The legislative history of the Public Vessels Act, elaborately discussed in petitioner's brief, is quickly summarized. On May 29, 1924, Mr. Underhill introduced H. R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as the present provision is concerned. At that time, there were already pending two other bills, H. R. 6989 and H. R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H. R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress since 1920. It provided for suit

[7] The one decision directly holding that the Public Vessels Act extends to suits for personal injury (*New England Maritime Co.* v. *United States*, 55 F. 2d 674, 685 (C. C. A. 1)), involved a situation where death ensued to those aboard the nongovernment vessel as a direct result of a collision and proceeded on the theory that the Act was "remedial, and, under well settled practice of statutory construction, should be liberally construed."

"for damages caused by collision by a public vessel," and had the approval of all interested Government departments. H. R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, remove its existing limitation to only such vessels as are operated by the Government as merchant vessels. It would have resulted in making the United States liable for personal injuries by all public vessels exactly as it was already for those by its merchant vessels. H. R. 9075 had the powerful support of the Maritime Law Association of the United States and of Judge Hough, then the country's outstanding admiralty judge.[8] It did not have the unqualified approval of the interested departments, which were insisting on important changes.

The omission of H. R. 6989 and its predecessors to cover personal injuries had been the subject of criticisms, some of which are cited in the brief of respondent Porello. But protracted delays were apparent if an attempt were made to rewrite H. R. 9075 so as to meet the objections thereto. Instead of proceeding further with either H. R. 6989 or H. R. 9075, Mr. Underhill, for the Committee, in-

[8] House Judiciary Committee, Hearings on H. R. 9075, 68th Cong., 1st Sess., May 21, 1924. The Maritime Law Association had previously supported H. R. 13591, 66th Cong., 2d Sess., a bill similar to H. R. 6989. House Judiciary Committee, Hearings on H. R. 13591, 66th Cong., 2d Sess., February 2, 1921.

troduced H. R. 9535, which, in place of limiting its grant of jurisdiction to suits "for damages caused by collision by a public vessel," covered all suits "for damages caused by a public vessel." The purpose of this change is nowhere discussed.[9] Mr. Underhill, in explaining the intent of the proposed legislation, stated, however (66 Cong. Rec. 2087): "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."[10] Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the

[9] The words chosen bear a striking resemblance to those used in the British Admiralty Courts Jurisdiction Act, 1861 (24 Vict. c. 10, s. 7), and the Vice Admiralty Courts Act, 1863 (26 Vict. c. 24, s. 10), concerning the interpretation of which the Government has commented in its memorandum in *United States* v. *Lauro*, No. 514, this Term.

[10] Earlier bills, intended to cover only property damage, had employed the formula "for any loss, damage or injury to property, due in whole or in part to the fault of any vessel owned or operated by the United States." S. 4752, 65th Cong., 2d Sess.; H. R. 12667, 65th Cong., 2d Sess.

Public Vessels Act was not intended to cover suits for personal injury."

II

PETITIONER'S CONTENTION THAT PORELLO'S PRIOR ACCEPTANCE OF COMPENSATION PAYMENTS, NOT UNDER AN AWARD, BARS HIS ACTION AGAINST THE UNITED STATES WOULD APPEAR WITHOUT FOUNDATION

Neither in the lower courts nor here has the Government joined in petitioner's objection to jurisdiction based on Porello's acceptance, prior to the filing of his third-party action, of compensation payments tendered him under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424, as amended (33 U. S. C. 901–950). The point is treated at some length in the brief of respondent Porello. Accordingly, we confine our presentation to a discussion of certain inferences drawn by petitioner from the legislative history of the Compensation Act which, following consultation with the United States Compensation Commission, we deem to be erroneous.

Petitioner contends that a binding election waiving his third-party rights was made by Porello under the provisions of Section 33 (a) of

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[11] Some evidence that the Act was not understood by various Congresses to have granted jurisdiction with respect to personal injuries appears from the subsequent enactment of private bills compensating individuals for injuries "caused by" public vessels. See, *e. g.*, Act of June 23, 1938, c. 635, 52 Stat. 1388, H. Rep. 1891, 75th Cong., 3d Sess.; Act of June 14, 1941, c. 205, 55 Stat. 927, S. Rep. 106, 77th Cong., 1st Sess.

the Act (33 U. S. C. 933 (a)) when he collected compensation checks delivered to him at two-week intervals commencing October 5, 1942. Petitioner recognizes that since such payments were not made under an award by a deputy commissioner, the acceptance of the payments did not operate as an assignment to petitioner as Porello's employer of the right to proceed against a third-party tortfeasor under Section 33 (b) as amended (33 U. S. C. 933 (b)). As amended in 1938 that Section specifically provides that such an assignment occurs only upon acceptance of payments "under an award in a compensation order filed by the deputy commissioner." However, petitioner seemingly contends that acceptance of payments although not under an award, suspends the right otherwise provided by the Act of seeking recovery from a third-party tortfeasor, and effectively bars both the injured employee and his employer from such a remedy (Pet. Br. 30). Nothing in the language of Section 33 (a) or the legislative history of the Compensaton Act warrants such a conclusion.[12]

1. Section 33 (a) sets no time limit within which an "election" is to be made.[12] Moreover,

[12] Section 33 (a) provides: "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

the manner of election is specified; notice must be given the deputy commissioner of the employee's choice of remedy. In certain circumstances actual notice of an intention to sue the third party might preclude any right to receive further compensation under the Act. Literally read, Section 33 (a) would also seem to contemplate that an employee, although believing that third-party liability might exist, nonetheless may give notice of an intention to take compensation. It is conceivable that giving such notice might bar a third-party suit thereafter. But in the instant case the proceeding brought by Porello was in conformity with notice given the commission on March 30, 1943 (R. 89), of an intention to pursue his remedy against the United States as a "person other than the employer [who] is liable in damages." We see no warrant in the statute for barring the prosecution of such an action.

2. Petitioner's contention with reference to the legislative history of the Act and particularly the 1938 amendment to Section 33 (b) would seem to be summarized in the statement contained in its brief (p. 32) that:

> Surely, if Congress had intended, by its 1938 amendment of subdivision (b) of [Section 33 (b)] * * * to give the injured employee the right to simultaneously take compensation and also to sue a third party wrongdoer, it would have and could have so provided in conformity with the

previous year's amendment of the New York State Workmen's Compensation Law.

This argument, however, fails completely when it is realized that Congress in 1938 was not purporting to amend the federal statute with reference to the 1937 amendments to the New York law. For several years prior to 1938 the United States Employees' Compensation Commission had recommended the amendment of Section 33 (b) in the form finally adopted. In 1935 two previous bills, S. 2791 and H. R. 8293, 74th Cong., 1st Sess., had been introduced proposing the amendment of Section 33 (b) identical with that adopted in 1938. Furthermore, the letter of the Chairman of the Compensation Commission attached to H. Rep. 1945, 75th Cong., 3d Sess., p. 2, which again proposed the amendment, was written on February 24, 1937, whereas the amendments to the New York Act were not made until September 1 of that year. Finally, the excerpt from H. Rep. 1945, *supra*, quoted in petitioner's brief (p. 31)[13] referred not to the New York law as it read after the 1937 amendments, but as it existed prior thereto. See *Hession* v. *Sari Corporation*, 283 N. Y. 262; compare New York Laws of 1935, ch. 328, with New York Laws 1937, ch. 684. The inference petitioner seeks to draw from the fact that Congress did not amend the Longshoremen's and

[13] That "This amendment follows the New York workmen's compensation law, which contains a provision that the 'awarding' of compensation shall operate as an assignment of the cause of action."

Harbor Workers' Act in 1938 as fully or in precisely the same terms as had the New York legislature in dealing with its Compensation Act is therefore erroneous.

The Federal Act was amended for the specific purpose of avoiding the result reached in certain earlier decisions (*e. g., Sciortino* v. *Dimon S. S. Corp.*, 39 F. 2d 210 (E. D. N. Y.), affirmed, 44 F. 2d 1019 (C. C. A. 2)) which had construed Section 33 (b) as originally enacted to provide that mere acceptance of compensation without an award worked an assignment to the employer of the right to proceed against the third party. But it would appear plain that from the failure of Congress in 1938 to amend Section 33 (a), no inference can be drawn that third-party rights were intended to be left "suspended," in the sense referred to by petitioner (Pet. Br. 30), following the acceptance of compensation not under an award. No contemporaneous or prior court decision had so held and no language in the section itself is indicative of this result. See *Grasso* v. *Lorentzen*, 149 F. 2d 127, 128–129 (C. C. A. 2), certiorari denied, 326 U. S. 743.

III

THE COURT BELOW CORRECTLY DECREED FULL INDEMNITY IN FAVOR OF THE UNITED STATES

Petitioner does not challenge the concurrent finding of the district and appellate courts that it was guilty of negligence, but denies the conclu-

sions of the court below that the primary duty of care was upon it and that the conduct of its foremen was the active cause of the injury."[14] Petitioner apparently does not seriously deny that the United States is at least entitled to receive contribution from it should this Court hold that the Public Vessels Act extends to damages caused by personal injury. But it insists that the court below erroneously held that Article 12 of the stevedoring contract (*supra*, p. 5) established the right of the United States to full indemnity from petitioner (Pet. Br. 36–43), and it rejects the Government's contention that in any case it is entitled to full indemnity under the general law maritime (Pet. Br. 47). Petitioner also attempts to draw a distinction in respect of admiralty jurisdiction under Admiralty Rule 56 between situations where the right of respondent to indemnity or contribution is claimed under the general law maritime and those where the right is asserted under an indemnifying clause included as an incident of a contract for stevedoring or other maritime service (Pet. Br. 48–52). We submit (1) that the court below correctly con-

[14] See R. 89; 133 F. 2d at 608: "The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it." Cf. Article 4 of the contract (*supra*, p. 4), expressly declaring that the stevedore was responsible for taking off and putting on all hatches and beams.

strued the provisions of Article 12 of the contract; (2) that even in the absence of such a governing contractual provision the United States would be entitled to full indemnity in the circumstances of this case, and (3) that the purported distinction in jurisdiction on impleader which petitioner attempts to draw is without merit.

A brief analysis of the evidence respecting the occurrence of Porello's injury conclusively shows that the reckless conduct of petitioner's foreman DiMare and not the mere absence of a locking device on the hatch beam was the predominant cause of the accident. The plain terms of the contract expressly declared it to be the duty of the stevedore to perform what are in any case the usual functions of such a contractor in opening and closing hatches, removing and replacing beams and arranging for the stowage of cargo. Cf. *Imbrovek* v. *Hamburg-American Steam Packet Co.*, 190 Fed. 229, 232 (D. Md.); *The Susquehanna*, 176 Fed. 157, 158 (E. D. N. Y.). Thus in Article 4 of the contract it was expressly provided (R. 65):

> The stevedore shall take off and put on all hatches, beams and tarpaulins; load, shift and lay all dunnage other than flooring or shoring timbers for heavy lifts, except as provided in paragraph 9 hereof. The Stevedore shall also furnish and pay all winchmen.

Petitioner's foreman DiMare testified that it was his job to determine how many hatch covers should be taken off (R. 49). Petitioner's superintendent testified no instructions were given the stevedores about leaving the beam in place (R. 21). As stated by an independent stevedore appearing as an expert witness, locking devices are not required by regulations of the United States Bureau of Navigation and the absence of a locking device on the forward thwartship beam would not ordinarily be of significance in the performance of "a straight loading job" such as petitioner was doing on the *Thomas Stone* (R. 64). The beam weighed about a ton and when in place fitted in sockets nearly one foot deep (R. 57). It could be dislodged only by being lifted from its socket, and ordinarily there would be no occasion during loading when an upward pressure of over a ton might be exerted on the underside of the beam (R. 25, 64). In view of this testimony, it can hardly be claimed that injury to a longshoreman should have been foreseen by the Government from the mere fact that the beam weighing a ton was not equipped with a locking device.[15] Moreover, the hold of the

[15] Petitioner's own superintendent testified as follows as to DiMare's conduct (R. 22): "Q. He was an experienced man, was he not? A. Yes, sir. Q. And if he knew that there was no locking device on the end of the beam, you would expect him to do something, wouldn't you? A. Positively. Q. You would expect him to take some means to see that the beam did not get unshipped or that the danger of unshipping it was absent? A. That is right."

vessel was provided by the Government with hydraulic roller-jacks on which to move vehicles from place to place in the hold without the necessity of raising the vehicles in the slings by which they had been lowered into the hold (R. 40). Again, it was hardly foreseeable by the Government that DiMare would reject this method of handling and instead recklessly adopt a course which led directly to Porello's injury.

That DiMare knew of the absence of the locking device—the only fact from which negligence is imputed to the Government—is admitted (R. 55). He learned of this condition prior to commencing loading operations when he supervised taking off the hatch covers immediately above the No. 1 hold (R. 55, *cf.* 49, 74). At that time, he neither took the precaution of having the unremoved beam lashed in place—an operation which would have taken at most five minutes (R. 37, *cf.* 41–42, 59)—nor even considered the absence of a locking device on the beam of sufficient importance to bring to the attention of the ship's personnel (R. 55). Yet he was in complete charge of the stevedoring operations in that hold (R. 21, 27, 30), having received instructions only as to the order in which the cargo should be stowed (R. 21, 26–27).

Assuming, in view of the findings of both courts below, that the United States was negligent in failing to have a beam weighing a ton equipped

with a locking device,[16] we submit that DiMare's subsequent conduct in failing either to remove the beam or to lash the unremoved beam in place and in ordering a one and one-half ton vehicle raised while still resting in the sling in which it had been lowered into the hold, despite his knowledge that the beam was not secured and might become unseated, cannot be termed less than reckless. As a result of leaving the beam in place, the headroom under the part of the hatch thus left covered was just sufficient for an average man (R. 27), and, since the vehicle was over five feet in height (R. 66), it is obvious that the spreader above it must have been almost in contact with the under side of the beam at the time DiMare ordered it raised. That the spreader was almost against the beam also follows from the fact that the sockets in which

[16] The statement of the court below that, "Such a lock is customary, and the plans of the vessel called for it * * *" (R. 87) is not sustained by the record. The only testimony appearing in the record concerning the vessel's plans was given by a deck officer of the *Thomas Stone* who stated that he had examined such plans in the shipyard in which the vessel was converted for transport use, and that no locking device was called for by those plans, nor was any hole made in the beam for the insertion of a lock (R. 47–48, cf. 31). The only testimony concerning the frequency of installation of such locking devices was that of a Naval officer who stated that "I have seen both arrangements in hatch beams, with and without locking devices," but who could not say which arrangement was the more prevalent (R. 35). Such locking devices are not required by the safety regulations of the United States Bureau of Navigation (R. 64).

the beam rested were a foot deep, yet the beam was unshipped when the vehicle had been raised only a foot (R. 54). DiMare, standing at the opposite end of the vehicle from Porello at the time he gave the order to "pick it up a little bit" (R. 51), had only to glance along the length of the vehicle which had been turned from the position in which it had been lowered to a position underneath the beam (R. 27) to see that if raised the spreader could not clear the beam. Even had DiMare been ignorant of the fact that the beam was not secured, ordinary prudence and common practice of stevedores required him to find out whether the beam was made fast in some way before ordering such a maneuver (R. 28–29, 58–59). Yet DiMare, with knowledge that the beam was not secure and that Porello was directly underneath it (R. 52), not only gave the command, but when the vehicle failed to rise in response thereto made no investigation as to the reason, but instead repeated the order (R. 51).

We have discussed the foregoing considerations somewhat at length because we believe that a proper appreciation of them shows that petitioner's negligence was the primary cause of the injury to Porello and that, accordingly, the Government is entitled to full indemnity whether under the provisions of Article 12 of the contract or under the general maritime law.

A. THE RIGHT OF THE GOVERNMENT TO FULL INDEMNITY IS ESTABLISHED BY THE CLEAR AND UNEQUIVOCAL LANGUAGE OF THE CONTRACT

It would seem clear that the court below was correct in holding that the United States was entitled to be fully indemnified by the petitioner. Clauses whereby one party to a contract agrees to assume all responsibility and to indemnify the other against liability on account of claims for personal injuries have long been employed by contracting parties and upheld by the Courts. *Standard Oil Co.* v. *United States*, 264 Fed. 66, 69 (C. C. A. 4); *Cacey* v. *Virginian Ry. Co.*, 85 F. 2d 976 (C. C. A. 4), certiorari denied, 300 U. S. 657; *City of Cleveland* v. *Baltimore & O. R. R. Co.*, 71 F. 2d 89 (C. C. A. 6); *Buckeye Cotton Oil Co.* v. *Louisville & N. R. R Co.*, 24 F. 2d 347 (C. C. A. 6); *National Transit Co.* v. *Davis*, 6 F. 2d 729 (C. C. A. 3).[17] Thus stevedoring contracts often provide that the shipowner shall be indemnified even where the fault is exclusively that of the shipowner and his employees and the stevedore is without fault.[18] Such provisions are no

[17] Accord: *J. V. McNicholas Transfer Co.* v. *Penna. R. R. Co.*, 154 F. 2d 265 (C. C. A. 6); *Franklin Fire Ins. Co.* v. *Chesapeake & O. Ry. Co.*, 140 F. 2d 898 (C. C. A. 6); *Baltimore & O. R. R. Co.* v. *Youngstown Boiler & Tank Co.*, 64 F. 2d 638 (C. C. A. 6); *Southern Ry. Co.* v. *Blunt & Ward*, 165 Fed. 258 (C. C. S. D. Ala.); *Watkins* v. *Baltimore & O. R. R. Co.*, 29 F. Supp. 700 (W D Pa.).

[18] *E. g.*, *Kokusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co.*, 23 F. Supp. 403 (S. D. N. Y.), affirmed, 100 F. 2d 1016, where the stevedore was required to indemnify in

more than reasonable since the shipowner must surrender temporarily the complete control of his vessel to the employees of the stevedore so that they may perform their work as they see fit. See *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 Fed. 229, 232 (D. Md.); *The Susquehanna*, 176 Fed. 157, 158 (E. D. N. Y.); cf. Article 4 of the present contract.

The various contracts employed by the United States since World War I have not, however, ordinarily gone so far as to require indemnity where its employees were alone at fault, but, like that here involved, have included language expressly confined to those cases where the Government was not solely at fault but there was at least some fault on the part of the contractor and his employees.[19] Thus the language here was:

> The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, * * * through the negligence or fault of the Stevedore, his employees and servants.

Petitioner urges, however, that the protection of this unequivocal language must be still further

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cases "for which *either* or both of the parties hereto may or shall be liable."

[19] Compare Warshipsteve 3/1/44, Article 8, House Committee on the Merchant Marine & Fisheries, Compilation of Standard Contract Forms of the War Shipping Administration (1945), p. 513.

confined to cases where the Government was without fault by construing it as if it read "through the *sole* negligence or fault of the stevedore, his employees and servants." But the court below observed (R. 102; 153 F. 2d at 609), a construction limiting the indemnity to cases of the stevedore's sole fault would make the provision meaningless. Unless the Government were at fault in failing to furnish a seaworthy ship or by the affirmative negligence of its employees injured some third party, it would not be liable and could have no need of indemnity. The present is the very type of situation which requires such clauses. *Cacey v. Virginian Ry. Co.*, 85 F. 2d 976, 978 (C. C. A. 4), certiorari denied, 300 U. S. 657; *National Transit Co.* v. *Davis*, 6 F. 2d 729, 731–732 (C. C. A. 3); *City of Cleveland* v. *Baltimore & O. R. R. Co.*, 71 F. 2d 89, 91 (C. C. A. 6); *Watkins* v. *Baltimore & O. R. R. Co.*, 29 F. Supp. 700 (W. D. Pa.).

The contentions of petitioner deliberately disregard the rationale of the jurisprudence respecting clauses of this character.[20] This rationale is

[20] Petitioner's reference to the indemnity clause in *Weldon* v. *United States*, 65 F. 2d 748 (C. C. A. 1), as being similar to that in the case at bar is inaccurate. The clause there, while similar, was confined to "damage or injury to cargo." The United States sought indemnity against personal injury by reason of the clause requiring the contracting stevedore to "carry insurance protection" against such risks. In *Newport News Shipbuilding Co.* v. *United States*, 34 F. 2d 100, 107 (C. C. A. 4), such a provision for insurance protection had been held to be for the benefit of both contracting parties.

best stated in *Dudar* v. *Milef Realty Corp.*, 258 N. Y. 415, 421, where the court said:

> The contractor's contractual obligation was obviously intended to relieve the owner from liability for injury suffered by any person "in the course of the performance" of work by the contractor. The owner was not exposed to such liability in the first instance, unless failure, on its part, in some duty owed to the injured party contributed to the injury. A construction of the contractor's obligation which would exclude from its scope all injuries in which the contractor failed in some duty owed would entirely defeat the purpose of the obligation and render the obligation illusory. * * * Enough that the contractor's obligation plainly covers injuries caused by the contractor's negligence * * * where the owner's negligence, if any, was only passive and in the performance of a duty owed not to the contractor but to the injured party.

It is obvious that the fundamental question is accordingly whether the injury occurred in consequence of the performance of the contractor's work. Thus petitioner's reliance upon *United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9), as conflicting with the result reached by the court below arises from petitioner's misconception of the rationale of that case. Indemnity was there denied because the accident occurred in the course of independent repair work carried on by the shipowner separately from the work being done

under contract by the indemnitor (repair contractor) and over which the latter had no authority or control whatever.[21] It was caused by the negligent handling of a scaffolding by one of the shipowner's employees in a "mode * * * so unusual that it could not have been reasonably anticipated either by the [injured party] or the contractor." No negligence was shown on the part of the contractor or his agents. The court held (18 F. 2d at 21):

> Effect and a reasonable construction may readily be given to the provision here by holding that it covers only cases where in respect to the injured person both contractor and owner are at fault. In going on the ship to do the work, and in using its tackle, the contractor had to take them as it found them. Upon it rested the primary duty to its servants to make proper inspection to see that both places and instrumentalities were reasonably safe. While as to a workman the contractor's default in this respect might not relieve the owner from responsibility in case of an injury, it would make it reasonable to require the former alone to bear the loss; hence the provision for indemnity. * * * [But] we should not * * * conclude that the parties in-

[21] The district court rested the denial of indemnity squarely on that ground, observing (16 F. 2d at 313), "the intention being to provide against loss occasioned by the party's own conduct, over which the indemnified has no control, and not acts of negligence of the indemnitee, who has sole control of his own actions and of his agents or employees."

> tended the contractor should assume an obligation * * * [for an] act of negligence on the part of the owner, or of one of his employes, over whom the contractor had no restraint or control * * *.

The hypothetical situation thus posed by the court in that case is the actual situation here. For the purpose of conducting its stevedoring operations, petitioner had to be given a free hand on the vessel. Not only by virtue of generally applicable principles, but by clear intendment of the contract, "upon it rested the primary duty to its servants to see that both places and instrumentalities were reasonably safe." *United States* v. *Wallace, supra,* at p. 21; cf. Article 4 of the Contract, *supra,* p. 4, *Imbrovek* v. *Hamburg-American Steam Packet Co., supra,* 190 Fed. at 232; *The Susquehanna, supra,* 176 Fed. at 158; *The Thomas P. Beal,* 295 Fed. 877, 880 (W. D. Wash.). Petitioner failed completely in the performance of this duty. Even upon actual discovery of the absence of a locking device, it took no precautionary steps nor did it request that the United States do so. The situation would be no different had the beam been equipped with a locking device which was not fastened, and had petitioner's foreman, DiMare, noticing this fact, nevertheless taken no steps to fasten it. Following its failure to take any steps to insure the safety of its employees by lashing or otherwise securing the unremoved beam, petitioner, as shown above, con-

ducted its loading operations with reckless disregard of the known fact that the beam was not fastened down. As suggested by the court in the *Wallace* case, "the contractor's default in this respect might not [and here did not] relieve the owner from responsibility in case of an injury." But where the United States in contemplation of this possibility has provided that it shall be indemnified for accidents occurring in the course of the contractor's performance of the work unless the contractor shall have been in the exercise of due care, no reason exists, we submit, for not giving effect to that provision.

Petitioner's chief ground for attempting to exclude cases where both parties are at fault and to limit the protection of Article 12 to cases involving the sole fault of the stevedore is that, as we have seen, its language fails to extend to the limit of requiring the stevedore to indemnify the Government as shipowner even in cases where the Government alone is at fault (Pet. Br. 39–40). Petitioner also insists that the clause is insufficient under the generally accepted principle that express language is necessary to provide indemnity against the indemnitee's own fault (Pet. Br. 38–39). That supposed rule is not one of general application but the outmoded result of considerations of public policy in cases of common carriers. *Southern Ry. Co.* v. *Blunt & Ward,* 165 Fed. 258, 259 (C. C. S. D. Ala.); cf. *Trenton Pass. R. R. Co.*

v. *Guarantors Liability Indem. Co.*, 60 N. J. L. 246. The accepted rule for construction of agreements indemnifying against the indemnitee's own fault is well stated in *Buckeye Cotton Oil Co.* v. *Louisville & N. R. R. Co.*, 24 F. 2d 347, 348 (C. C. A. 6):

> * * * a contract will not be so construed, unless it was clearly intended to have that effect. This, of course, does not mean that the intention must be expressed in terms, but that, if not so expressed, it must otherwise clearly appear in the language used.

In the present case the language of the contract is plain and unequivocal that petitioner assumed responsibility and is bound to indemnify the United States. There is no necessity for resort to any aids to interpretation.

Petitioner implies that it was misled as to the effect of Article 12 of the contract and never intended to assume any risk where the fault of the Government itself contributed (Pet. Br. 42). But it was common knowledge that the United States had insisted on the broadest possible interpretation of this type of clause. See *United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9). The language was not ambiguous, nor were contracting stevedores unfamiliar with such clauses. Petitioner is as chargeable with knowledge of its own obligation as is the Government. Cf. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296. To such contentions it would seem a short

answer that the courts are not at liberty to revise the contract since such items "naturally would enter into the calculations of the parties with respect to the rate to be charged." *Santa Fe Ry. Co.* v. *Grant Bros.*, 228 U. S. 177, 189; *Standard Oil Co.* v. *United States*, 264 Fed. 66, 69–70 (C. C. A. 4). The Government would have paid less without petitioner's assumption of such risks; more if it had asked indemnity against even its sole fault.[22]

B. EVEN WITHOUT THE CONTRACTUAL PROVISION, THE GOVERNMENT IS ENTITLED TO FULL INDEMNITY UNDER THE FACTS OF THIS CASE

Such negligence as the court attributed to the United States in failing to supply a vessel with beams equipped with locking devices was passive only. Even aside from the express provision of Article 12, the United States is entitled to full indemnity from petitioner, which was chargeable with active negligence in consequence of the reckless conduct of its foreman. It is common ground to the petitioner and the Government alike that the Longshoremen's and Harbor Workers' Com-

[22] Petitioner states that the defense of various actions has been returned to the assureds by their protection and indemnity insurers on the ground that an assured is not covered for liabilities assumed by contract (Pet. Br. 39). But the record is devoid of indication that such is here the case. Indeed, were liability declined, we might expect the insurer to have been impleaded. See *Tullgren* v. *Jasper*, 27 F. Supp. 413, 416, (D. Md.). There would be no jurisdictional difficulty since there is original admiralty jurisdiction of suits on P & I policies. *Eagle Star & British Dominion Ins. Co.* v. *George A. Moore & Co.*, 9 F. 2d 296 (C. C. A. 9).

pensation Act does not take away the Government's general legal right of recovery over against petitioner. Petitioner urges, however, that the United States may recover no more than contribution. We submit that the Government is entitled to full indemnity on the ground that the acts of petitioner's foreman were both a breach of its contractual duty properly to stevedore the vessel and also conduct so reckless as to require it to bear the entire loss.

1. The court below, after first stating that Section 5 of the Longshoremen's Act prevented the Government from recovering over against the petitioner, withdrew this dictum on rehearing as not essential to its decision after both petitioner and the Government indicated disagreement with it on this point.[22a] It would seem, however, that the immunity which the act gives petitioner from suit by Porello against it as his employer does not destroy the right of the United States to recovery over. The law is settled in that sense as regards the effect of the New York Compensation Act. *Westchester Lighting Co.* v. *Westchester Small Estates Corp.*, 278 N. Y. 175, 179; *Burris* v. *American Chicle Co.*, 120 F. 2d 218, 222 (C. C. A. 2). And with substantial unanimity the district

[22a] The court below after originally observing, "Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability it has been compelled to pay" (R. 88; 153 F. 2d at 607), on rehearing remarked that the point might be left open as not essential to the decision (R. 101; 153 F. 2d at 609).

courts have followed the same rule in respect of the Longshoremen's Act.[23] It would seem that there could be no doubt on the point. The Government's right of indemnity or contribution is not derivative but original. It does not depend on any right of Porello against his employer. *The Tampico*, 45 F. Supp. 174, 175 (W. D. N. Y.); cf. *Erie R. R. Co.* v. *Erie & Western Transp. Co.*, 204 U. S. 220, 225–226.[24] The situation is identical with that arising under the Harter Act where the owner of a seaworthy vessel is relieved of liability to its own cargo, but must respond to the claim for liability over of another vessel in a "both to blame" collision situation. *The Chattahoochee*, 173 U. S. 540; *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394. Compare the situation resulting from the giving of a release. *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992, 1001 (C. C. A. 3).

2. Petitioner urges that the conclusion of the Court below that the negligence of petitioner

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[23] *The Tampico*, 45 F. Supp. 174, 175 (W. D. N. Y.); *Severn* v. *United States*, 1946 A. M. C. 1468, 1470 (S. D. N. Y.); *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, 305 (D. Me.); *Green* v. *War Shipping Adm.*, 66 F. Supp. 393 (E. D. N. Y.); cf. *Calvino* v. *Pan-Atlantic S. S. Corp.*, 29 F. Supp. 1022, 1023 (S. D. N. Y.).

[24] The correct distinction is well stated by Hulbert, D. J., in *Brosnan* v. *American President Lines*, 1943 A. M. C. 526, 528 (S. D. N. Y.): "If this were a case where the defendant was offering the plaintiff's employer to the plaintiff as the one solely liable for the injuries complained of, it might be

and the Government operated concurrently "militates * * * * against any consideration of active and passive negligence" and suggests that such considerations involve the comparative negligence rule (Pet. Br. 47).[25] We submit that this contention is unsupported by the court's opinion. The court's holding that the negligence of the United States and petitioner "operated concurrently in producing the result" does not imply a finding that the parties were in *pari delicto,* or a holding that the rights of the parties *inter-sese* may not be ad-

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doubted whether such employer could be joined as a third party defendant in view of the provisions of Sec. 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 905) whereby an employe's liability is limited. Such were the situations in *Calvino* vs. *Farley*, 1939 A. M. C. 190, 26 F. Supp. 431; *Calvino* vs. *Pan Atlantic S. S. Corporation*, 1940 A. M. C. 289, 29 F. Supp. 1022; and *Paolillo* vs. *Rederi A/B Disa*, 1941 A. M. C. 759, 38 F. Supp. 833. However, in the case at bar, the defendant seeks to allege a claim by way of remuneration or recoupment against the employer. As indicated in *Calvino* vs. *Pan Atlantic S. S. Corp.*, *supra*, such a claim may be set up in a third party complaint." Cf. *Cataldo* v. *A/S Glittre*, 41 F. Supp. 555, 557 (E. D. N. Y.).

[25] Contrary to petitioner's suggestion, the rule of primary and secondary liability or active and passive fault, recognizing a right of indemnity where the acts of two joint tortfeasors are of dierent character, has nothing to do with comparative negligence. See *Fidelity & Casualty Co.* v. *Federal Express*, 136 F. 2d 35, 40 (C. C. A. 6). It appears rather to be connected with the common law doctrine of last clear chance or with the major and minor fault rule of the American admiralty, whereby damages are not divided when the fault of one party is only slight and that of the other predominant.

judged upon a comparison of their conduct with respect to the injured person.

It seems obvious that the court declined to pass on the contention that the United States is entitled to indemnity irrespective of the contractual provisions simply because it considered it unnecessary to do so in view of the clear right of the United States to be indemnified by petitioner under the provisions of Article 12 of the contract. With respect to petitioner's role in causing Porello's injuries, the court below stated (R. 89; 153 F. 2d at 608):

> It [petitioner] was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it. Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss, and the quoted provision [Article 12, *supra*] was inserted in the contract for that purpose. The United States argues that, even without such a provision, it would be entitled to full indemnity. See *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327; *Burris* v. *Am. Chicle Co.*, 120 F. 2d 218, 222 (C. C. A. 2); *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886 (C. C. A. 9). However that may be, we

think the contract entitles it to full indemnity and the decree must be modified accordingly.

It is thus apparent that the court below did not hold that the petitioner and the United States were joint tortfeasors in the sense that they were in *pari delicto*. On the contrary, for the purpose of determining whether judgment might properly be rendered against the United States at all, it was necessary for the court below to decide whether "the absence of a lock and [foreman] DiMare's negligent order operated concurrently in producing the result." A holding that the sole negligence involved was petitioner's would have defeated Porello's action and relegated him to the acceptance of compensation under the Longshoremen's Act. The alternate holding that the negligence of both petitioner and the United States operated "concurrently in producing the result" permitted the entry of judgment against the United States predicated upon its failure to furnish Porello a safe place to work.

But the fact that judgment was thus rendered against the United States does not establish that as between the Government and petitioner, the latter may not be required to make the Government whole for any recovery awarded Porello. *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489; cf. *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327–328; *Fidelity*

& Casualty Co. v. *Federal Express Co.*, 99 F. 2d 681 (C. C. A. 6). Indeed, the court below obviously deemed the conduct of petitioner's foreman to have been the primary negligence involved. This follows not only from the fact that the court in the excerpt above quoted referred to petitioner's "primary duty to furnish its employees a safe place to work" (cf. *United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9); *The Thomas P. Beal*, 295 Fed. 877, 880 (W. D. Wash.), but also from the fact that the court expressed doubt whether "the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman * * *." Notwithstanding the validity of the court's decision in holding the Government liable to Porello in the circumstances of this case,[26] there exist well-defined grounds upon which the United States is entitled to recover full indemnity from petitioner.

The Government is entitled to full indemnity because the contractual relationship between itself as shipowner and the petitioner as stevedore was such that the duty of the latter skillfully and properly to stevedore the vessel was broken by

[26] Concurrent fault of another, although active, does not relieve one liable for neglect to furnish a safe place of employment. *Kreigh* v. *Westinghouse & Co.*, 214 U. S. 249, 257; *Deserant* v. *Cerillos Coal R. R. Co.*, 178 U. S. 409, 420; *La Guerra* v. *Brasileiro*, 124 F. 2d 553, 555 (C. C. A. 2), certiorari denied, 315 U. S. 824; *Southern Pacific Co.* v. *DeValle Da Costa*, 190 Fed. 689, 698 (C. C. A. 1); *Memphis Gas Co.* v. *Creighton*, 483 Fed. 552, 555 (C. C. A. 6).

the negligence of petitioner's foreman. The general relationship established by the contract made the petitioner-stevedore responsible for the loading of the vessel and made it liable to the shipowner for its negligence occurring during the loading operation even though the owner might be liable to a third party. As described in the Restatement of Restitution, c. 3, Section 95, the circumstances of such liability are as follows:

> Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.

This rule is supported by a number of cases at law.[27] In admiralty it has been applied in *Guy* v. *Donald*, 157 Fed. 527, 530 (C. C. A. 4), and *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F. 2d 769, 771 (C. C. A. 9). Where, as in the case at bar, the contractor is guilty of active negli-

[27] *Pfau* v. *Williamson*, 63 Ill. 16; *Chicago Railways Co.* v. *R. F. Conway Co.*, 219 Ill. App. 220; *Minneapolis Mill Co.* v. *Wheeler*, 31 Minn. 121; *Brooklyn* v. *Brooklyn City R. Co.*, 47 N. Y. 475; *Interborough Rapid Transit Co.* v. *New York*, 237 App. Div. 612; *Newell Bridge & Ry. Co.* v. *East Liverpool Traction & Light Co.*, 7 Ohio App. 241.

gence the circumstance that structural defects, of which the contractor knew or might have known, contributed does not affect the result. *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886 (C. C. A. 9); *The No. 34*, 25 F. 2d 602, 607 (C. C. A. 2); *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (C. C. A. 2), affirming 25 F. 2d 339 (E. D. N. Y.); cf. *The Aden Maru*, 51 F. 2d 599, 601 (S. D. Tex.).

The Government is likewise entitled to full indemnity because such passive negligence as it might be guilty of in furnishing the beam without a locking device was followed by the reckless conduct of petitioner's foreman which was the predominant cause of the accident. That the foreman's conduct was predominant in causal effect and may properly be characterized as reckless and not merely negligent appears clearly from the decision, *supra*, pp. 23–27. The conditions of such liability are described as follows in the Restatement of Restitution, c. 3, Section 97:

> A person whose negligent conduct combined with the reckless or intentionally wrongful conduct of another has resulted in injury for which both have become liable in tort to a third person is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at a time when the negligent tortfeasor could not have done so.

The rule thus stated is supported by various cases at law.[28] While no admiralty decision appears to have passed upon the applicability of this rule, it is believed that the cases involving the contractual situation equally support its application. Cf. *Oceanic Steam Navigation Co.* v. *Coia Transatlantic Espanola,* 134 N. Y. 461, 467. It is submitted, therefore, that even in the absence of Article 12 of the contract the United States is entitled to full indemnity at the hands of petitioner.

C. PETITIONER'S CONTENTION THAT THERE IS NO JURISDICTION TO ENFORCE ARTICLE 12 OF THE CONTRACT IN A PROCEEDING UNDER ADMIRALTY RULE 56 IS WITHOUT MERIT

The court below correctly held that jurisdiction might rest upon the fact that the United States could have sued the impleaded respondent in a civil action if not in admiralty. It has long been settled that independent admiralty jurisdiction of an ancillary claim is unnecessary to support an impleading petition under Admiralty Rule 56[29]

[28] *Nashua Iron & Steel Co.* v. *Worcester Nashua R. Co.*, 62 N. H. 159; *Colorado & Southern Ry. Co.* v. *Western Light & Power Co.*, 73 Colo. 107; *Knippinberg* v. *Lord & Taylor Co.*, 193 App. Div. 753, 184 N. Y. S. 785; *Colonial Motor Coach Corp.* v. *New York Central Ry. Co.*, 131 Misc. 891, 228 N. Y. S. 508; *Eastern Texas Elec. Co.* v. *Joiner* (Tex. Civ. App.), 27 S. W. 2d 917; cf. *Missouri, Kansas & Texas Ry. Co.* v. *Missouri Pac. Ry. Co.*, 103 Kan. 1.

[29] Rule 56 (28 U. S. C. fol. Sec. 723) provides in part: "In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. * * *"

where the whole controversy should be litigated at once. The reason for the rule was well stated long ago by Judge Hough in *Evans* v. *New York & P. S. S. Co.*, 163 Fed. 405, 407 (S. D. N. Y.), where he said:

> * * *. It seems clear that neither the libelant nor the steamship company could have maintained an original suit in admiralty against the Beards, because the negligence resulting in the disappearance of the rubber from the land warehouse did not give rise to a maritime tort, and neither was the contract between shipowner and warehousemen a maritime contract. Having found, however, that the carrier is responsible to the libelant, the former clearly has his remedy over against the warehousemen, and, in order to prevent circuity of action and multiplicity of suits, it would have been, under our practice, competent for the shipowner to have petitioned the warehousemen into this proceeding, and; if this could have been done, no reason appears why the warehousemen may not be proceeded against as an original respondent.

As stated by the court below, all doubt as to jurisdiction, if any there be, is effectively removed by the existence of any independent head of federal jurisdiction.[20] *Soderberg* v. *Atlantic*

[20] Where jury trial is not demanded, no constitutional question can arise. *United States* v. *The John R. Williams*, 144 F. 2d 451, 454 (C. C. A. 2), certiorari denied, 323 U. S. 782. But even demand for a jury need present no difficulty in view of the court's powers to separate issues for trial.

Lighterage Corp., 19 F. 2d 286, 287 (C. C. A. 2), certiorari denied, 275 U. S. 542; *Admiral Oriental Line* v. *United States*, 86 F. 2d 201, 203 (C. C. A. 2), further proceedings 88 F. 2d 26; *Cory Bros. & Co.* v. *United States*, 51 F. 2d 1010, 1012 (C. C. A. 2); cf. *Tuthill* v. *United States*, 38 Fed. 538 (C. C. N. Ill.), appeal dismissed, 136 U. S. 652; *Conners Marine Co.* v. *Petterson Lighterage & Towing Corp.*, 151 F. 2d 662 (C. C. A. 2), certiorari denied April 22, 1946. So far as regards admiralty jurisdiction, this Court appears not to have passed upon the question, but at law it was well settled, even before the adoption of the Rules of Civil Procedure, that a party liable over to the defendant might be impleaded despite the absence of independent federal jurisdiction. *Phelps* v. *Oaks*, 117 U. S. 236; *Hardenbergh* v. *Ray*, 151 U. S. 112; *City of Waco* v. *U. S. F. & G. Co.*, 293 U. S. 140; *Alexander* v. *Hillman*, 296 U. S. 222; *Moore* v. *N. Y. Cotton Exchange*, 296 Fed. 61 (C. C. A. 2), affirmed, 270 U. S. 593.[21]

[21] Impleader for liability over is in effect merely a development of the practice of vouching in the party ultimately responsible, so as to bind him by the proceedings. *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 329; *Aetna Life Ins. Co.* v. *Maxwell*, 89 F. 2d 988, 991 (C. C. A. 4). The situation of merely tendering the impleaded third party to the plaintiff as one jointly liable is entirely different. There the addition of the third party is not ancillary and original jurisdiction is indispensable. Compare *Friend* v. *Middle Atlantic Transp. Co.*, 153 F. 2d 778 (C. C. A. 2), certiorari denied June 10, 1946, with *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968 (C. C. A. 2), and *Williams* v. *Keyes*, 125 F. 2d 208 (C. C. A. 5), certiorari denied, 316 U. S. 699.

In any case, there can be no doubt that admiralty had jurisdiction here. There was admiralty jurisdiction of an independent suit on Article 12 of the contract. It is elementary that both a stevedoring contract and injuries to a stevedore are maritime transactions within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59–60; *Cory Bros. & Co.* v. *United States*, 51 F. 2d 1010, 1011 (C. C. A. 2). Nor has it ever been doubted that a contract of marine protection and indemnity insurance against third-party claims is a maritime contract of independent orginal admiralty jurisdiction. A clause in any maritime contract, such as for stevedoring a vessel, which provides similar protection and indemnity in respect of third-party claims arising in the performance of the particular contract, is equally an obvious matter of original admiralty jurisdiction. *The No. 34*, 25 F. 2d 602, 607 (C. C. A. 2), certiorari denied, 278 U. S. 606 (stevedoring contract); *Moran Towing & Transp. Co.* v. *Navigazione Libera Triestina*, 92 F. 2d 37, 39 (C. C. A. 2), certiorari denied, 302 U. S. 744, *semble Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291 (towage contracts); *Davis* v. *Dittmar*, 6 F. 2d 141 (C. C. A. 2); *The Toledo*, 122 F. 2d 255 (C. C. A. 2), certiorari denied, 314 U. S. 689 (charters). And no distinction in jurisdiction has ever been drawn between cases where the respondent-impleaded was liable to indemnify by virtue of

an express provision of a contract rather than by implication of law.[32]

Petitioner's reliance upon *The Wonder*, 79 F. 2d 312, 314 (C. C. A. 2), a prior decision of the court below, to establish a lack of jurisdiction of suits on indemnity clauses, is unwarranted. That case is fully discussed in *Severn* v. *United States*, 1946 A. M. C. at 1471, where it is pointed out that the principal contract involved in *The Wonder* was to construct a drawbridge; hence, the indemnity clause was ancillary to a nonmaritime contract. As the court in the *Severn* case concluded, "It is clear that jurisdiction was declined, not because the clause called for indemnity, but because the subject matter was non-maritime." How narrow

[32] Stevedoring contracts: *Barbarino* v. *Stanhope S. S. Co.*, 151 F. 2d 553 (C. C. A. 2); *Benevento* v. *United States*, 1946 A. M. C. 858 (S. D. N. Y.); *The Thomas P. Beal*, 295 Fed. 877, 880 (W. D. Wash.), further proceedings 298 Fed. 121; *semble United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9); *Calvino* v. *Pan-Atlantic S. S. Corp.*, 29 F. Supp. 1022 (S. D. N. Y.); repair contracts: *Severn* v. *United States*, 1946 A. M. C. 1468 (S. D. N. Y.); *Green* v. *War Shipping Adm.*, 66 F. Supp. 393 (E. D. N. Y.); *Brosnan* v. *American President Lines*, 1943 A. M. C. 526; wharfage contracts: *Eastern Mass. St. Ry. Co.* v. *Transmarine Corp.*, 42 F. 2d 58, 63 (C. C. A. 1), certiorari denied, 282 U. S. 883; *The Blue Mountain*, 20 F. Supp. 165, 167 (D. Conn.); towage contract: *Moran Towing & Transp. Co.* v. *United States*, 56 F. Supp. 104 (S. D. N. Y.); fumigating contract: *Luckenbach S. S. Co.* v. *Ruddy Fumigant Co.*, 11 F. Supp. 390 (W. D. Wash.); construction contracts: *Berwind-White Coal Mining Co.* v. *City of New York*, 135 F. 2d 443, 446 (C. C. A. 2); *Kelley Island Lime & Transport Co.* v. *City of Cleveland*, 47 F. Supp. 533, 544 (N. D. Ohio).

was the basis of *The Wonder* appears from the later decision of the same court in *Berwind-White Coal Mining Co.* v. *City of New York,* 135 F. 2d 443, 446 (C. C. A. 2), where admiralty jurisdiction was entertained of a suit on an indemnity clause in a nonmaritime contract to construct a trestle because the construction involved a requirement to restore the river bottom to a navigable condition. Thus it is evident that where, as here, the indemnity clause is incident to a contract to perform any maritime service, or is invoked in consequence of a maritime tort, there can be no doubt of the jurisdiction of an admiralty court to enforce it.

CONCLUSION

For the reasons stated, it is respectfully submitted that, unless this Court should conclude that there is no jurisdiction under the Public Vessels Act, the decision below should be affirmed.

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DECEMBER 1946.

APPENDIX

1. The Public Vessels Act, c. 428, 43 Stat. 1112–1113 (46 U. S. C. 781–790), provides in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the pro-

visions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

2. The Federal Tort Claims Act, Title IV, Act of August 2, 1946 (Public Law 601, 79th Cong., 2d Sess.), provides in part that:

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accord-

ance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

SEC. 421. The provisions of this title shall not apply to—

* * * * *

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741–752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781–790, inclusive), relating to claims or suits in admiralty against the United States.

3. The Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424–1446, as amended (33 U. S. C. 901–950) provides in part as follows:

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

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SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1946.

American Stevedores, Inc., Petitioner, *v.* Rosario Porello and the United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 10, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

Porello, a longshoreman, was injured in 1942 while working in the hold of the U. S. S. Thomas Stone, a public vessel of the United States. His employer, American Stevedores, Inc. (called American hereinafter), was engaged in loading the vessel under a stevedoring contract with the United States. Within two weeks of the accident which caused the injuries American's insurance carrier, in compliance with § 14 of the Longshoremen's and Harbor Workers' Compensation Act,[1] 33 U. S. C. §§ 901–950, and without the compulsion of an award of compensation by a deputy commissioner under § 19, began compensation payments to Porello, who negotiated the checks he received. In March of 1943 Porello gave notice in accordance with § 33 (a) of election to sue the United States as a third party tortfeasor rather than to receive compensation. In the same month he filed a libel, amended in November, 1943, to recover damages from the United States under the Public Vessels Act of 1925,[2] 46

* This opinion also covers No. 514, *The United States of America* v. *Maria R. Lauro, as Administratrix of the Goods, Chattels, and Credits of Peter Lauro, Deceased*, on certificate from the United States Circuit Court of Appeals for the Second Circuit.

[1] 44 Stat. 1424, as amended by 52 Stat. 1164.

[2] 43 Stat. 1112:

". . . a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for

U. S. C. § 781 *et seq.*, for the injuries to his person sustained in the accident. Exceptions to the libel being overruled, the United States answered, denying fault on its part and claiming sovereign immunity from suit. Later, by a petition charging American with fault and setting forth an indemnity provision of the stevedoring contract, the United States impleaded American.[3] American then answered the libel, denying fault and asserting as an affirmative defense that, by accepting compensation payments, Porello had lost his right to sue a third party tortfeasor.

The District Court held that Porello was not barred from maintaining the action. At trial it appeared that a beam lying athwart a hatch had fallen into the hold and struck Porello, causing the injuries complained of. The Court held that the United States was negligent in not providing a locking device on the end of the beam, and held that American was negligent through its foreman, whose orders to the operator of a cargo boom caused the beam to be dislodged. Porello was awarded damages from the United States, the United States to receive contribution from American as a joint tortfeasor to the extent of half the damages less the compensation payments received by Porello. On cross appeals by the United States and American the Circuit Court of Appeals held that American was bound by the indemnity provision of the stevedoring contract to make the United States completely whole. With that modification it affirmed the decree below. 153 F. 2d 605. The important issue in this proceeding is whether the Public Vessels Act makes the United States liable for damages on account of personal injuries.

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damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States. . . ."

[3] See Rule 56, Rules of Practice for U. S. Courts in Admiralty and Maritime Jurisdiction.

The Circuit Court of Appeals thought that this question was decided by the *Canadian Aviator* case,[4] but since the issue was not squarely posed in that case we granted certiorari in order to determine it at this time. — U. S. ——.

The Public Vessels Act provides that a "libel in personam may be brought against the United States . . . for damages caused by a public vessel of the United States. . . ."[5] Petitioner argues that the Act only provides a remedy for damage to property. "Damages," however, have historically been awarded both for injury to property and injury to the person—a fact too well-known to have been overlooked by the Congress in enacting this statute.[6] Nor is it easy to conceive any reason, absent intent to the contrary, not to have inserted the word "property" in the statute, an obvious method of imposing the limitation for which the petitioner here contends. Petitioner nonetheless argues that the legislative history of the statute conclusively shows that the congressional intent was to limit redress to property damage.

The history of the Act may be briefly detailed. Starting in 1920 various bills were introduced which provided for liability of the Government to suit for damages caused by its vessels.[7] We need only consider, however, the bills that were pending in the 68th Congress by which the present act was passed: H. R. 6989, H. R. 9075 and H. R. 9535. The first provided for suits against the United States "for

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[4] *Canadian Aviator Ltd. v. United States*, 324 U. S. 215.

[5] 43 Stat. 1112, 46 U. S. C. § 781.

[6] It might be noted here that there is a distinction between damage and damages. Black's Law Dictionary cautions that the word "damage," meaning "Loss, injury, or deterioration," is "to be distinguished from its plural,—'damages,'—which means a compensation in money for a loss or damage."

[7] H. R. 15979, 66th Cong., 3d Sess.; H. R. 6256, 67th Cong., 1st Sess.; H. R. 6989, 68th Cong., 1st Sess.; H. R. 9075, 68th Cong., 1st Sess.; H. R. 9535, 68th Cong., 1st Sess.

damages caused by collision by a public vessel." The second, designed as an amendment to the Suits in Admiralty Act, and supported by the Maritime Law Association of the United States,[8] would have amended that act so that it would not be limited to vessels operated by the Government as merchant vessels, and would thus have made the United States unquestionably liable to suit for personal injuries caused by public vessels.[9] This bill never reached the floor of Congress. The third bill, H. R. 9535, was enacted and became the present Public Vessels Act. Although "designed as a substitute for H. R. 6989,"[10] it omitted the words "by collision" which would have limited the liability of the United States to damages resulting from collisions by public vessels. The only discussion of any significance to the present inquiry related to the last of these bills. It is true, as petitioner points out, that the proponent of the bill in the House, Mr. Underhill, said, when the bill was introduced: "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."

"No vessel owned by the United States . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . ."

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained, at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. . . ."

Johnson v. *Fleet Corporation*, 280 U. S. 320; *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575.

[10] S. Rep. No. 941, 68th Cong., 2d Sess.

by owners of vessels whose property has been damaged." [11] Further, on inquiry as to whether suit could be brought only where blame was charged to the Government, he answered: "Not entirely; where a man's property is damaged he can bring a suit." [12] These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions. It is also true that the Committee report said that "the chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel." [13] However, in the same report a letter from the Attorney General was incorporated, which, while it was addressed to the predecessor bill, H. R. 6989, serves, in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect of the act. That letter explicitly stated that "The proposed bill intends to give the same relief against the Government for damages . . . caused by its public vessels . . . as is now given against the United States in the operation of its merchant vessels, as provided by the suits in admiralty act of March 9, 1920." As the right to sue for personal injuries under the Suits in Admiralty Act was clear, it may be inferred, at least as strongly as the opposite is implied by

[11] 66 Cong. Rec. 2087.

[12] 66 Cong. Rec. 2088.

[13] S. Rep. No. 941, 68th Cong., 2d Sess., p. 1. Of course the chief purpose of the bill was to provide a remedy for those who chiefly urged the bill—the vessel owners. But the committee, in so stating, cannot be taken to have made that purpose the only one. By that token the purpose would be to provide a remedy only for collision damages, a limitation clearly discarded by omitting the words "by collision" from the Act. *Canadian Aviator, Ltd.* v. *United States*, *supra*, n. 4.

Mr. Underhill's remarks, that the Committee understood that the Act would provide a remedy to persons suffering personal injuries as well as property damage.[14] Moreover, when the bill reached the floor of the Senate there was not the least indication that the members of that body believed that the Act limited relief to owners of damaged property.[15]

The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act[16] attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or

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[14] See note 9, *supra*.

[15] So the only pertinent comments follow, 66 Cong. Rec. 3560:

"MR. ROBINSON. I think the Senator from Delaware should state briefly to the Senate the effect of the bill. It seems to be a measure of considerable importance.

"MR. BAYARD. Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damage from maritime accidents in which United States vessels are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

". . . It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a district court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accidents of any kind resulting from collision, and so on, are taken care of. A great deal of money would be saved to the Government.

"Incidentally, the bill would accomplish something which should have been done in this country a long time ago. It would give an opportunity to do justice when Federal employees have committed an offense against an individual. . . .

"MR. ROBINSON. If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.

"MR. BAYARD. All claims of this nature."

[16] Public Law No. 601, 79th Cong., 2d Sess., §§ 401–424.

property damage. To hold now that the Public Vessels Act does not provide a remedy against the United States for personal injuries would in the future only throw this form of maritime action under the Federal Tort Claims Act; for that Act excepts from its coverage "Any claim for which a remedy is provided by the Act . . . of March 3, 1925 [The Public Vessels Act] (U. S. C., title 46, secs. 781–790, inclusive). . . ." [17] We cannot believe that the Public Vessels Act, read in the light of its legislative history evinces a Congressional intent only to provide a remedy to the owners of damaged property.

This determination does not dispose of all the issues raised by the *Porello* case. When impleaded by the United States in the trial court, American, the petitioner here, pleaded as an affirmative defense that Porello, having accepted compensation payments from American, lost whatever right of action he had against the United States as a third party tortfeasor. The petitioner admits that § 33 (b) of the Longshoremen's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third party tortfeasor, a conclusion which courts had reached under the former wording of the Act.[18] But it contends that the amendment did no more, and that acceptance of compensation still operates as a conclusive election

[17] *Id.*, § 421.

[18] The statute formerly provided, 44 Stat. 1440:

"Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

Under this form of the statute courts had held that acceptance of compensation precluded the employee from suing a third party tortfeasor. *Sciortino* v. *Dimon S. S. Corp.*, 39 F. 2d 210, aff'd 44 F. 2d 1019; *Toomey* v. *Waterman S. S. Corp.*, 123 F. 2d 718; *The*

not to sue. It is quite clear that mere acceptance of compensation is not the kind of election for which provision is made by § 33 (a) of the Act, which provides for notice of intention to the deputy commissioner,[19] so the argument is technically imperfect. But in any event, election not to sue a third party and assignment of the cause of action are two sides of the same coin. Surely the Act was never intended and has never been held to provide that after acceptance of compensation, and until an award, neither employer nor employee could sue the third party tortfeasor. If so held, an employer who was not responsible over to the third party might lose his chance to recoup compensation payments from the third party, while the third party might escape all liability. American, in the unusual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation.[20] In this way it could probably have forced an award and the consequent assignment of the right of action to itself.

Congress has provided that unless an employer controverts the right of the employee to receive compensation,

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Nako Maru, 101 F. 2d 716; *Freader v. Cities Service Trans. Co.*, 14 F. Supp. 456. *Contra, Johnsen* v. *American-Hawaiian S. S. Co.*, 98 F. 2d 847.

As amended the statute provides, 52 Stat. 1168:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to the compensation to recover damages against such third person."

[19] 33 U. S. C. § 933 (a):

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

[20] See 33 U. S. C. § 914 (d) and (h).

he must begin payments within two weeks of the injury.[21] The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for compensation.[22] The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor.

American further argues that the court below, as an admiralty court, did not have jurisdiction of the indemnity provision of the stevedoring contract, and that therefore the decree granting full indemnity to the United States from American was beyond its power. A stevedoring contract is maritime. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62; *The Muskegon*, 275 F. 348. And although admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful, the cases raising such doubts are concerned only with contracts for the performance of partly non-maritime activities. See *The Richard Winslow*, 71 F. 426; *Pillsbury Flour Mills Co.* v. *Interlake S. S. Co.*, 40 F. 2d 439. To sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. Such a provision is a normal clause in contracts to act for others and no more determines the nature of a contract than do conditions on the time and place of payment.

[21] 33 U. S. C. § 914 (b), (e).

[22] 33 U. S. C. § 913 (a).

Whether the indemnity provision was rightly construed by the court below is a more difficult question. It was provided that:

> "The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees, and servants."

The Stevedore, American, contends that it is liable to indemnify the United States only if damages resulted from its negligence alone. Respondent, United States, argues and the court below held, that such an interpretation would render the provision meaningless since the United States would "be liable only if itself at fault" and that the clear meaning of the provision is that the Stevedore would be liable so long as the accident was caused in whole or in part through its negligence.

American, however, insists that the clause merely stated existing law. On this record we cannot answer the contention of either party. As it stands the clause is ambiguous. Evidence might well have been taken as to the intention of the parties, but was not.[23] It may be that the parties only meant American to indemnify the United States should the Government be held liable for damages solely caused by American's negligence. It may be that the intention was that American should fully reimburse the United States for all damages caused

[23] American moved the Circuit Court of Appeals for an order allowing the parties to take proof and to submit it to the court as to the intent of the parties respecting the indemnity clause of the contract, or in the alternative for an order remanding the proceeding to the District Court for further hearing as to the intent and meaning of the clause. The Circuit Court of Appeals denied the motion.

in any part by American's negligence. Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault. Although the usual rule in admiralty, in the absence of contract, is for each joint tortfeasor to pay the injured party a moiety of the damages, *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *Barbarino* v. *Stanhope S. S. Co.*, 151 F. 2d 553, we do not believe that the last alternative, which provides for a measure of comparative negligence, is necessarily beyond the intent of the parties. Comparative negligence is not unknown to our maritime law. *The Max Morris*, 137 U. S. 1; *The Henry S. Grove*, 22 F. 2d 444; see Robinson on Admiralty, p. 91. From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law.

We therefore affirm the decree of the Circuit Court of Appeals as to Porello. We reverse so much of the decree as awards indemnity to the United States under the contract and remand the case to the District Court for determination of the meaning of the contract.

The case of *United States* v. *Lauro*, No. 514, is here on certificate from the Circuit Court of Appeals for the Second Circuit. The certificate is quoted in full in the note.[24]

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[24] "Statement of facts

"On May 27, 1943, Peter Lauro died as a result of injuries suffered by him on May 26, 1943, while he was employed by Marra Bros., contracting stevedores, on board respondent's vessel, designated as No. 596, which vessel was docked at Pier 4, Staten Island, New York.

The only question posed by the case is whether a suit for damages for death by wrongful act will lie under the Public Vessels Act. It is settled that where death "results from a maritime tort committed on navigable waters

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The death was caused by personal injuries suffered by Lauro when he fell from a hatch cover on the vessel's main deck into the hold. At the time of the accident, the vessel, No. 596, was owned by the United States of America, respondent, and had been allocated by the respondent to the United States Army. It was being loaded with cargo which was owned by the United States, and which consisted of Army and Navy property and Lend-Lease material which was being shipped to North Africa. Marra Bros., the employer of the deceased, was hired by the United States Army to load the vessel.

"Thereafter, Lauro's widow filed a libel in the United States District Court for the Eastern District of New York against United States of America to recover damages under the Public Vessels Act of 1925; 46 U. S. C. Section 781, for wrongfully causing Lauro's death. In this proceeding the District Court rendered a decree awarding damages to the libelant in the sum of $25,000. From this decree an appeal was taken to this court, and the cause came on for argument on March 12, 1946. On this appeal, the respondent-appellant contended that the said Public Vessels Act of 1925 provided a remedy against the United States for damage to property only, but not for damage to a person of damage arising by reason of the death of a human being. The question thus arising is as follows:

"Question certified

"Does the word 'damages,' as it appears in the following sentence of the Public Vessels Act of 1925; 46 U. S. C. § 781:

'A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920'

mean damages to property only, or does it mean, as well, damages under Sections 130 to 134 of the Decedent Estate Law of the State of New York recoverable by a personal representative because of the death of a human being? Which question, arising from the facts aforesaid, is hereby submitted to the Supreme Court."

within a State whose statutes give a right of action on account of death" the admiralty will entertain a libel for damages sustained by those to whom the right is given. *Western Fuel Company* v. *Garcia*, 257 U. S. 233. See discussion in *Just* v. *Chambers*, 312 U. S. 383, 388–391. Here the death occurred on navigable waters of New York, which has a statute granting a right of action for damages on account of wrongful death. Nor can damages suffered on account of death be distinguished from damages on account of personal injuries. Death is the supreme personal injury. For the reasons stated in the *Porello* case we conclude that the word "damages" in the Public Vessels Act, § 1, 46 U. S. C. § 781, means damages under §§ 130–134 of the New York Decedent Estate Law. Accordingly we answer the certificate as follows: The word "damages" as used in 46 U. S. C. § 781 includes damages under §§ 130–134 of the Decedent Estate Law of the State of New York recoverable by a personal representative because of the death of a human being.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1946.

American Stevedores, Inc., Petitioner, *v.* Rosario Porello and the United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 10, 1947.]

Mr. Justice Frankfurter, with whom The Chief Justice concurs, dissenting.

Without disregarding the significance which we have heretofore attached to legislative history, I cannot give the Public Vessels Act [1] the scope given it by the Court.

It can hardly be maintained that, in the setting of legal history, the phrase "damages caused by a public vessel" must cover personal injuries due to failure to provide proper working conditions for a longshoreman. The problem for construction is not whether the term "damages" may be applied to money compensation for hurt to person or property. What is to be construed is "damages caused by a public vessel". Standing by itself, that phrase, spontaneously read, may well mean damage inflicted by a public vessel rather than "damages" incurred in connection with its operation. All we held in *Canadian*

[1] 43 Stat. 1112, 46 U. S. C. § 781: "That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920."

Aviator, Ltd. v. United States, 324 U. S. 215, was that its personnel was part of the public vessel for purposes of "causing" damage to another vessel.

The words do not stand alone. They are illumined by the legislative history of the Public Vessels Act. This history has been so accurately summarized in the Government's brief that we shall avail ourselves of it:

"On May 29, 1924, Mr. Underhill introduced H. R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as the present provision is concerned. At that time, there were already pending two other bills, H. R. 6989 and H. R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H. R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress since 1920. It provided for suit 'for damages caused by collision by a public vessel,' and had the approval of all interested Government departments. H. R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, remove its existing limitation to only such vessels as are operated by the Government as merchant vessels. It would have resulted in making the United States liable for personal injuries by all public vessels exactly as it was already for those by its merchant vessels. H. R. 9075 had the powerful support of the Maritime Law Association of the United States and of Judge Hough, then the country's outstanding admiralty judge. It did not have the unqualified approval of the interested departments, which were insisting on important changes.

"The omission of H. R. 6989 and its predecessors to cover personal injuries had been the subject of criticisms, some of which are cited in the brief of respondent Porello.

But protracted delays were apparent if an attempt were made to rewrite H. R. 9075 so as to meet the objections thereto. Instead of proceeding further with either H. R. 6989 or H. R. 9075, Mr. Underhill, for the Committee, introduced H. R. 9535, which, in place of limiting its grant of jurisdiction to suits 'for damages caused by collision by a public vessel,' covered all suits 'for damages caused by a public vessel.' The purpose of this change is nowhere discussed. Mr. Underhill, in explaining the intent of the proposed legislation, stated, however (66 Cong. Rec. 2087): 'The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents.' Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the Public Vessels Act was not intended to cover suits for personal injury."

In scores of cases in recent years this Court has given "decisive weight" to legislative history. It has done so even when the mere words of an enactment carried a clear meaning. An impressive course of decisions enjoins upon us not to disregard the legislative history of the Public Vessels Act unless it is so completely at war with the terms of the statute itself that we must deny one or the other. We can find such a conflict only by reading the Act itself with dogmatic inhospitality to the usual illuminations from without.

We cannot escape the conclusion that there was no jurisdiction for this libel in the District Court.[2]

[2] This conclusion is reinforced by the Report of the Senate Committee that "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel" S. Rep. No. 941, 68th Cong., 2d Sess., p. 1. The Court's opinion finds overriding significance in a letter by the Attorney General commenting on the Bill, in which he stated that it "intends to give the same relief against the Government for damages caused . . . by its public vessels" as was given by the Suits in Admiralty Act. That Act did afford the right to sue for personal injuries. To prefer the Attorney General's view to that expressed by those in charge of a measure would in itself be not the normal choice. And this letter of the Attorney General antedated the Report of the Committee and the statement of Representative Underhill. Compare *United States* v. *Durkee Famous Foods*, 306 U. S. 68, 71, where the Committee Report "stated that the purpose of the bill was set out in a letter from the Attorney General which it quoted." To reject the subsequent authoritative statements of the Congressional proponents of the legislation and to accept the view of the Attorney General to which the Government now does not even refer, is to discard in favor of dim remote light what heretofore has been deemed controlling illumination.